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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/758,296
Filing Date: January 15, 2004
Appellant(s): WALTER ET AL.

Marianne Timm
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 9/23/08 appealing from the Office action mailed 3/13/08.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

0691078A2	ALESSANDRO	01-1996
D376466	RICKE et al.	12-1996

5417150	KORDIC	5-1995
5968566	MCDANIEL et al.	10-1999
3975552	STANGROOM	08-1976
5441751	VAGANI	08-1995
5576036	PESHECK et al.	11-1996

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-3, 5-9, 11-16, 18-21, 45-47, 52 are rejected under 35 U.S.C. 103(a) as being unpatentable over Alessandro (EPA 0691078) in view of Stangroom, Vagani, McDaniel et al, Ricke et al and Kordic

Alessandro discloses a parbaked crust formed from a dough having the composition as set forth in the table on column 2. The crust is topped with topping and baked at temperature of 300-450 degree C. (see page 2)

Alessandro et al do not disclose the amount of oil as claimed, the dimension of the edge, a square or rectangular shape, edge having irregular profile such as sinusoidal or connected line segments, the degree of expansion as claimed, the surface area, thickness and weight as claimed.

Kordic discloses pizza pie mold. The mold can have a round, square or rectangular shape. (see col. 2 lines 7-10)

Vagani discloses a precooked pan pizza dough. Vagani discloses a dough containing 1.48% oil. (see col. 3 lines 60-67)

Stangroom discloses a method of making pizza. Stangroom teaches the pizza dough contains up to about 5% oil, preferably about 1-3%. (see col. 5 lines 25-42)

McDaniel et al disclose a yeast-raised pizza dough. They disclose doughs containing 1.73% or 1.16% oil (see examples 1,2)

Ricke et al disclose an ornamental design for pizza crust. The edge is scallop and has line segments.

It would have been obvious to use less or more amount of oil depending on the texture and the oil content wanted; this parameter would have been well within the determination of one in the art. Pizza dough having varying amounts of oil ranging from 4-5 (disclosed by Alessandro), to up to 5 (shown by Stangroom) to between 1-2% (as shown by McDaniel et al and Vagani) are known as exemplified in the prior art listed in

the rejection. It would have been obvious to one skilled in the art to vary the fat content within the known ranges shown by the prior art depending on the fat content, texture, flavor and taste desired. It is obvious the crust has the degree of expansion because expanding during baking is a natural occurrence of dough. The degree to which the dough expands depends on several factors such as the proofing time, the amount of yeast used, the amounts of ingredients in the formulation etc... Thus, it would have been within the skill of one in the art to determine the degree of expansion that gives the most optimum texture and taste. Such determination is within routine experimentation to obtain the most optimum product and optimization is within the skill of one in the art. It would have been obvious to one skilled in the art to shape the crust in any design wanted. This would have been an obvious matter of preference. Pizza crust having ornamental design is known in the art as exemplified by the Ricke et al disclosure. Variation in design without any effect on the functionality of the product would have been an obvious matter of choice. Ricke et al show pizza having a scallop edge with line segments. It would have been obvious to one skilled in the art to vary the appearance of the edge to obtain different pattern of pizza crust. This is a variation in design without any effect on the functionality of the product. Variation in design would have been an obvious matter of choice. When the edge is not a straight line but a different pattern as shown by Ricke et al, then part of the surface departs from the planar surface of the crust. It would have been obvious to one skilled in the art to vary the edge and the degree of departure depending on the pattern desired. It is obvious the edge having a pattern will acquire toast mark when baked. It would have been

obvious to have these marks to resemble any product depending on the look wanted. It would have been obvious to form the edge in any dimension depending on the size of the crust desired. It would also have been obvious to vary the size of the pizza to have any varying surface area and weight and to vary the thickness depending on the type of crust wanted. If a thick, large crust is wanted, it would have been obvious to increase the thickness and the size to obtain the desired end result; it is also equally obvious to do the opposite or any variation in between. It is a matter of preference that is within the skill of one in the art. It would have been obvious to form the pizza in square or rectangular shape because such shape is well known for pizza as exemplified in the Kordic disclosure. Changing or forming in any particular shape would have been an obvious matter of preference. When the crust has a square shape, it is obvious that the crust will have a fourfold symmetry.

Claims 10, 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Alessandro (EPA 0691078) in view of Stangroom, Vagani, McDaniel et al, Kordic and Ricke et al as applied to claims 1-3, 5-9,11-16,18-21,45-47, 52, and further in view of Pesheck et al.

None of the references teaches applying breadcrumbs the surface of the crust.

Pesheck et al disclose a pastry system. They teach to coat the surface of the dough with a crisping agent such as bread crumb to avoid sogginess and facilitates the provision of crispness in the final dough product. The dough products include open-face dough such as pizza. (see col. 4 lines 45-50, col. 5 line 7, col. 6 lines 36-41)

It would have obvious to coat the crust with bread crumbs to enhance the crispness of the product as taught by Pesheck et al. Bread crumb is notoriously well known to be used for such purpose as exemplified in the Pesheck et al disclosure. The amount depends on the degree of crispness desired and can readily be determined by one skilled in the art.

(10) Response to Argument

On pages 23-24 of the appeal brief, appellant argues the cited references do not disclose, teach or suggest the claimed irregular edge with symmetry in a rectangular or square food. Appellant points out that the Ricke reference is round and regular and Kordic appears to teach a regular square or rectangular crust with no irregular edge. This argument is not persuasive. Appellant argues against the reference individually while the rejection is relied on the combination of references. It is true that Ricke teaches a round pizza crust with irregular edge. However, pizza crust having a round shape, rectangular shape or square is notoriously well known in the art; such shapes are taught in Kordic. Kordic discloses molds for forming pizza crust having a round, square or rectangular shape. To make a pizza crust having an irregular edge and a rectangular or square shape would have been obvious to one skilled in the art in view of the teaching of Ricke and Kordic because both designs are taught and to combine the designs to produce a product having a different configuration would have been an obvious matter of preference depending on the design wanted. Changing the shapes and designs of food products is not an uncommon concept. In fact, food products often come in many different shapes and configurations. For example, cookies have many

different shapes ranging from geometric figures to delicate flower to architectural designs. Ice cream products have many different configurations ranging from regular shapes such as rectangular bar, square bar to fanciful figures such as Mickey Mouse bar, Sponge Bob bar etc... While appellant repeatedly argues the claimed irregular edge with symmetry is not obvious, appellant does not present evidence or reasoning for why such modification would not have been obvious. If a round crust can have an irregular edge, then a square or rectangular crust can also have an irregular edge. On page 24 of the appeal brief, appellant contends that the examiner misses the point of the invention because it is the edge with its irregular profile that is symmetrical around the crust. The examiner's position is that if the crust has a square or rectangular configuration, then it is obvious the edge with its irregular profile will also have a square configuration. The edge is an integral part of the crust; if the overall crust has symmetry, then the edge would also have symmetry. Furthermore, Riche et al show that the irregular edge is substantially uniform throughout; thus, when such edge is imposed on a square or rectangular shape, the edge will be uniform throughout and thus will exhibit symmetry. For instance, the crust having the edge disclosed in Riche et al will have substantially identical edge or overlapping edge when it is folded over on itself.

On page 25, appellant comments that " if any pizza shape is obvious, a design patent on the scalloped edge in the Riche patent could not have issued". It is precisely the issuance of such design pattern that makes the claimed product obvious in view of the knowledge in the art. The patent shows that variation in design of a pizza crust is

known and appellant is not the first to recognize that pizza crust can have different design. On the same page, appellant further argues a person skilled in the art would not be motivated by a round pizza with a uniform repeating scallop edge to design an irregular edge. A scallop edge is an irregular edge because it is not a straight edge commonly found in pizza crust. One would be motivated to design such an edge if such configuration is desired. Appellant's comment about precise automatic cutting and topping equipment is not germane to the issue at hand because the claims are not directed at a process of making the crust.

On pages 27-30 of the appeal brief, appellant argues the references do not disclose, teach or suggest the claimed registration means engaging edge. This argument is not persuasive. The registration means engaging edge as defined in appellant's specification is a recessed portion found on the edge such as in figure 1A in relation to pins 105. Appellant points this out on page 30 of the appeal brief. The scallop edge shown in the Ricke et al patent has recessed portion; thus, the reference does teach the claimed registration means engaging edge.

On page 31, appellant states that the formulation of the unique pizza food is not a simple optimization or routine experimentation. While making this broad statement, appellant does not specifically point to any parameter in the claimed product that cannot be determined by simple optimization or experimentation. On page 33 of the appeal brief, appellant argues the modification of the numerous aspects such as the amount of oil, the crust expansion, the edge pattern, the thickness, the surface area, the weight and other claimed aspects cannot be obvious and the selection without hindsight is

impossible. While listing many parameters, appellant only argues the irregular edge and registration means engaging edge; this issue has already been addressed. With respect to the other parameters such as oil content, crust expansion, thickness, surface area etc., appellant states the modification cannot be obvious but does not explain why they cannot be obvious. With respect to the oil content, it would have been obvious to use less or more oil depending on the texture and the oil content wanted; this parameter would have been well within the determination of one in the art. Pizza dough having varying amounts of oil ranging from 4-5 (disclosed by Alessandro), to up to 5 (shown by Stangroom) to between 1-2% (as shown by McDainel et al and Vagani) are known as exemplified in the prior art listed in the rejection. It would have been obvious to one skilled in the art to vary the fat content within the known ranges shown by the prior art depending on the fat content, texture, flavor and taste desired. Appellant has not shown why this would not have been obvious to one skilled in the art in view of the teaching of the prior art. As to the expansion, it is obvious the crust has the degree of expansion because expanding during baking is a natural occurrence of dough. The degree to which the dough expands depends on several factors such as the proofing time, the amount of yeast used, the amounts of ingredients in the formulation etc... Thus, it would have been within the skill of one in the art to determine the degree of expansion that gives the most optimum texture and taste. The thickness of pizza crust can vary; there is pan pizza which has a thick crust, thin pizza which has a thin crust or hand-tossed pizza in which the crust is an intermediate between thick and thin. Thus, varying the thickness of pizza crust is notoriously well known in the art and is not

knowledge gleaned only from appellant's disclosure. Each of the parameters pointed by appellant is addressed in the rejection with explanation of why they would have been obvious to one skilled in the art. Appellant has not presented any concrete evidence or reasoning to show why they would not have been obvious other than the conclusion that they cannot be obvious.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Lien T Tran/

Primary Examiner, Art Unit 1794

Conferees:

Steve Weinstein

/Steve Weinstein/

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Supervisory Patent Examiner, Art Unit 1700